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Kentucky Resources Council, Inc.

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July 29, 1998

John H. Hankinson, Jr.  
Regional Administrator  
USEPA Region IV  
100 Alabama Street  
Atlanta GA 30303

Re: Kentucky Antidegradation Policy  
Dance Enterprises Mobile Home Park; Kentucky  
KPDES No. KY012810

Dear Mr. Hankinson:

This letter requests your prompt action to begin the process of promulgating for Kentucky a federal water quality standard implementing an antidegradation policy for protecting Tier II waters, and to utilize your discretionary authority to intercede in the state discharge permit process as needed to assure that the quality of waters which are entitled to protection against degradation under 40 CFR 131.12(a)(2) are in fact protected.

By letter dated August 7, 1997, your office determined that 401 KAR 5:030, which was adopted by the state Division of Water in order to implement the antidegradation requirements of 40 CFR Section 131.12, "fail[ed] to address the implementation of the policy for the entire groups of waters and parameters which should receive consideration under Tier II of the policy."

Specifically, your agency disapproved 401 KAR 5:030 Section 1(3) because the criteria for according Tier II antidegradation protection to streams was not "sufficiently inclusive[.]" The letter requested that Kentucky "modify this subsection to include additional selection criteria under subsection 1(3)" which criteria must "address the inclusion of Tier II waters where water quality conditions exceed the levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." The letter further noted that either the "designational approach" or the "pollutant-by-pollutant" approach could be used.

Additionally, your agency disapproved Section 1(5)(a)(5) of 5:030 because it does not include a Tier II decision process before allowing lower water quality for carcinogens.

Your letter triggered an obligation on the part of the Commonwealth to "adopt replacement standards consistent with the above discussion within 90 days of receipt of this letter." By letter dated October 9, 1997, Secretary James Bickford responded by declining to adopt such revisions and by instead committing to consider the changes as part of the next triennial review process. The letter noted that "the regulatory process does not allow us to promulgate revisions to regulations within ninety days[,]" and noted further that the triennial review process should begin in late spring or early summer of 1998.

It is now late summer, 1998, and there has been no "notice of intent" filed to commence the regulatory process for review and revision of the state water quality standards. Contrary to the letter of October 9, 1997, the state Division of Water has the capacity to adopt emergency regulations where exigent circumstances require immediate adoption, followed by consideration of a permanent replacement regulation. Adoption of state emergency regulations in response to a federal requirement is expressly contemplated as an appropriate use of emergency regulation authority by the Governor.

Your disapproval of the state water quality standard and the failure of the state to respond by promulgating a regulation to resolve the areas identified in your letter, also triggered an obligation on your part to "promptly" implement a federal water quality standard for Kentucky in order to implement those aspects of the antidegradation policy that your agency found wanting. Your obligation to "promptly propose and promulgate" a federal water quality standard reflecting the changes specified in your letter of disapproval, is mandatory. 40 CFR 131.22. In contrast to the permissive language of 40 CFR 131.22(b), (:the Administrator may also propose"), the language of 131.22(a) states that the Administrator shall promulgate a federal water quality standard *promptly* where the state has failed to take action. Kentucky had and has the authority to amend 401 KAR 5:030 to conform to the requirements of your letter, and has chosen not to do so. Your office is obligated to promulgate a federal standard in this case by the unmistakably mandatory language of 131.22(b). The use of the term "shall" indicates a mandatory intent. See, for example, Escoe v. Zerbst, 295 U.S. 490, 493 (1935) ("shall is the language of command."); Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Boyden v. Commissioner, 441 F.2d 1941, 1943 (D.C. Cir. 1971); South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118 (D.S.C. 1978).

Proper protection for "Tier II" Waters of the Commonwealth has languished for enough years. The inaction of your agency in response to the October 9,

1997 letter is troubling, and I am writing, in the context of the above-referenced application for a discharge permit into the South Elkhorn Creek, to ask:

1. that your office promulgate for the Commonwealth of Kentucky a federal water quality standard implementing an antidegradation policy for Tier II waters; and
2. that your office develop an interim strategy of case-by-case review and comment on each KPDES permit issued by the Commonwealth in order to assure that the proposed discharge will not adversely affect a water for which Tier II protection should be accorded because of quality for any parameter above the baseline for the designated use(s).

The Council believes that the South Elkhorn Creek, possesses water quality for a number of parameters which are above that level necessary to sustain the designated uses. The *South Elkhorn Drainage Biological and Water Quality Investigation For Stream Use Designation* Report, (Division of Environmental Services, Biological Branch, Technical Report No. 2) in 1983 recommended that the South Elkhorn Creek be classified for aquatic life and both primary and secondary contact recreation throughout the stream reach. The report noted that the basin "contains substantial, diverse warmwater aquatic habitat, as reflected by the aquatic flora and fauna."

As such, in order to establish appropriate water quality-based permit limits, the in-stream water quality must be assessed and any wastewater discharges which would lower water quality for any parameter for which the stream is in better-than-attainment status, must be justified in accordance with 40 CFR 131.12(a)(2). The state has proposed a KPDES permit for the Dance Enterprises facility which does not contain an antidegradation review consistent with the requirements of 40 CFR 131.12. I ask that you exercise your discretionary authority to review this permit, and implement a policy of such reviews for all future permits where it is anticipated that the receiving stream may be eligible for protection or scrutiny under 40 CFR 131.12(a)(2).

Thank you for your prompt response to these concerns.

Sincerely,

*Tom FitzGerald*

Tom FitzGerald  
Director